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IN THE

Supreme Court of the United States

October Term, 1944

No. 7

LYNCH CORPORATION, THOMAS CHANDLER WERBE, E. G. BRIDGES, A. G. DOLL, J. L. WATTS, UZ McMURTRIE AND N. M. McCULLOUGH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court of the United States for the Northern District of Ohio, Western Division

REPLY BRIEF ON REARGUMENT ON BEHALF OF LYNCH CORPORATION, THOMAS CHANDLER WERBE, E. G. BRIDGES, A. G. DOLL, J. L. WATTS, UZ McMURTRIE AND N. M. McCULLOUGH

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The District Court entered the final judgment without giving due consideration to the objections submitted to the judgment proposed by the plaintiff below. These appellants were included in the drastic injunctive provisions of the decree in disregard of the nature of Lynch Corporation's business and previous conduct as distinguished from

that of other defendants and in the absence of evidence and findings that Lynch Corporation and its individual defendants had previously engaged in many of the practices enjoined. The final judgment as entered thereby imposes upon Lynch Corporation et al. unreasonable and unjust penalties unauthorized by law.

"As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted, the application of remedies two-fold in character, becomes essential: 1st.—To forbid the doing in the future of acts like those we have found to have been done in the past which would be violative of the statute. 2nd.—The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about." *Standard Oil Co. vs. U. S.*, 221 U. S. 1, 77-78.

"The court was bound to frame its decree so as to suppress the unlawful practices and to take such reasonable measures as would preclude their revival." *Ethyl Corp. vs. U. S.*, 309 U. S. 436.

Although most of the injunctive provisions will not affect the future conduct of Lynch Corporation because it has never engaged in such practices, nevertheless the drastic and sweeping provisions of these sections of the judgment place Lynch and its associated individual appellants in possible jeopardy for contempt in pursuing ordinary innocent business practices.

"This court will strike from an injunction decree restraints upon the commission of unlawful acts which are

thus disassociated from those which a defendant has committed." *Swift & Co. vs. United States,* 196 U. S. 376; *New York, N. H. & H. R. Co. vs. Interstate Commerce Commission,* 200 U. S. 361, 404, and see under National Labor Relations Act, *National Labor Relations Board vs. Swift & Co.,* 108 F. 2d 988. *Labor Board vs. Express Pub. Co.,* 312 U. S. 426, 435. It should follow that the court will likewise strike from a decree restraints on the commission of *lawful* acts which are disassociated from those which the trial court has found a defendant has committed.

The Government attempts to justify restraining these appellants from committing acts disassociated from those which they have been found to have committed by presenting the novel argument that once a defendant has become a "partner in crime" he is chargeable with the acts of his fellows done in furtherance of the joint venture. (Gov. Br. 11.) This is not the law. In the case cited by plaintiff in support of its theory, *U. S. vs. Crimmins,* 123 Federal 2nd 271, Judge Learned Hand says: "It is never permissible to enlarge the scope of the conspiracy itself by proving that some conspirators, unknown to the rest, have done what was beyond the reasonable intendment of the common understanding."

The principle that each member of a conspiracy is chargeable with acts of his fellows is applied as a rule of evidence and in support of a conviction in criminal cases for unlawful conspiracy, but here we are dealing with the question of the propriety of enjoining a defendant from the commission in the future of acts similar to those committed by others years prior to this defendant's connection with the conspiracy concerning which the defendant had no knowledge whatsoever. The court has broad power to

restrain acts which are the same type or class as unlawful acts committed *in the past*, or whose commission in the future, unless enjoined, *may be fairly anticipated from a defendant's conduct in the past* (*Labor Board vs. Express Pub. Co.*, 312 U. S. 426), not from the mere legal fiction that a conspirator is chargeable with all the acts of a co-conspirator.

In order to determine whether there is any relation between the many acts, lawful and unlawful, from which Lynch is enjoined, a brief reference to this appellant's participation in the conspiracy becomes necessary. In 1927, when 70% of the narrow-neck forming machines in use were Lynch machines, Lynch patent applications were placed in interference with those of Headley & Thompson (Findings 313, 315, R. 7345). Lynch thereafter engaged in an extended patent controversy costing Lynch approximately $250,000 and in June, 1933, priority was granted to the Headley & Thompson patents then under option to and later purchased by Hartford (Complaint 113, R. 35, Lynch Answer 33, R. 230, Findings 315, 317). On August 23, 1933, Hartford and Lynch entered into the cross-licensing forming machine agreement under which Lynch secured the right to make and deliver forming machines embodying Hartford's inventions (including the Headley & Thompson inventions) to any person that should obtain from Hartford a license under Hartford's inventions to use such machines. The District Court found that this agreement violated Section 1 of the Sherman Act and Section 3 of the Clayton Act (Conclusions 65, 66).

The District Court also found that on August 31, 1933, Lynch, with the financial assistance of Hartford, Owens, William E. Levis and Harry E. Collin, acquired substan-

tially all of the assets of Edward Miller's glass machinery business for $450,000 (Finding 328, R. 7347), and concluded that Lynch's acquisition of Ed Miller's business was illegal under Sections 1 and 2 of the Sherman Act (Conclusion 64, R. 7415). The District Court also found that from August 23, 1933, until September 18, 1940, Lynch had sold no narrow-neck forming machines to any manufacturer who was not a feeder licensee of Hartford, and from August 23, 1933, until November 12, 1938, sold no wide-mouth forming machines to any manufacturer who was not a feeder licensee of Hartford (Finding 338, R. 7349); that on November 12, 1938, Section 8 of the Forming Machine Agreement (which the court found constituted a substantial restraint upon Hartford's ability to compete with Lynch (Finding 335, R. 7348) was cancelled and Hartford granted Lynch the right to make and deliver wide-mouth machines, embodying Hartford inventions, to customers without requiring them to secure a license to use such machines from Hartford (Finding 347, R. 7351). Although in the foregoing findings the District Court refers to September 18, 1940, he failed to find that on such date Hartford and Lynch cancelled all previous agreements and entered into a new cross-licensing agreement eliminating all previous allegedly tying clauses and pursuant to which Lynch offers to sell all models of its machines, narrow-neck as well as wide-mouth, without requiring purchasers to secure any license from Hartford to use such machines, and has actually sold machines to custmers who were neither feeder nor forming machine licensees of Hartford. (R. 2848.)

To summarize, the unlawful acts found to have been committed in the past by Lynch were (1) Purchase of Ed Miller assets, coupled with the Hartford-Lynch forming machine agreement under which certain models of wide-

mouth Miller machines embodying Hartford inventions until November 12, 1938, were sold by Lynch to customers who secured a license from Hartford to use such machines.

(2) Execution of the August 23, 1933, non-exclusive cross-licensing Forming Machine Agreement between Hartford and Lynch and contracts supplementary and incidental thereto; Lynch's grant of an exclusive license to Owens under Lynch's suction machine inventions, and a similar license to Hartford under Lynch's feeder inventions.

In view of the amendment of the cross-licensing agreement on November 12, 1938, cancelling Section 8 and freeing wide-mouth (Miller) machines from the requirement that the users thereof secure a license from Hartford, and the freeing of narrow-neck machines from Hartford licensing requirements on September 18, 1930, there is no justification for including Lynch in the final judgment because all issues of illegal conduct on the part of Lynch have become moot. *Standard Oil Co. vs. U. S.*, 283 U. S. 163, 182. (See pp. 87 to 94 principal brief of Lynch Corp. et al.)

If, on the other hand, the findings and decisions of the trial court are to be affirmed by the Supreme Court, it would be appropriate for the judgment to enjoin Lynch from entering into similar agreements in the future, but there is no warrant whatsoever for the arbitrary inclusion of Lynch in other sections of the judgment because whatever power to restrain trade may have been unlawfully obtained by other defendants was never obtained by Lynch itself. Lynch's position in the case is essentially that of a licensee under Hartford's inventions. Neither the evidence nor the findings disclose any dangerous probability of the resumption of challenged contracts or practices by Lynch.

Whatever measures the Supreme Court may ultimately find necessary and appropriate to dissolve the combination

found to exist it is unnecessary, inappropriate and punitive to, in effect, cancel all of Lynch's present and future glass-machinery patents (Sections 24 and 26); to cancel the September 18, 1940, agreement between Hartford and Lynch under which Lynch has merely a non-exclusive right to employ Hartford inventions in its machines without any alleged tying clause (Section 27); to prevent any of the individual defendants associated with Lynch from holding securities of corporations engaged in the manufacture of glassware or glass-machinery, or becoming an officer or director of more than one such corporation (Sections 33-35); to require Lynch to offer for sale the remnant of the assets acquired from Miller in 1933.

Other sections of the decree do not seriously penalize Lynch except by imposing upon the company the constant necessity of checking its normal business contracts against the vague restrictions found throughout the judgment, but we urge upon the court that these other restrictions are inappropriate as applied to Lynch Corporation because neither the evidence nor the findings support them.

In the last pronouncement of the court the test is whether or not the required action reasonably tends to dissipate the restraints and prevent evasions. "In no instance has it (Congress) indicated an intention to interfere with ordinary commercial practices." *U. S. vs. Bausch & Lomb Co.*, 321 U. S. 707, 726, 728.

Assuming that the decision below is affirmed, it is respectfully submitted that Section 48 of the judgment is adequate to forbid the doing in the future of acts like those found to have been done in the past in violation of the

Sherman Act, and that the judgment should be modified by striking therefrom each and every reference to Lynch Corporation and its associated individual defendants except with respect to Section 48.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 733 [redacted] 8

BALL BROTHERS COMPANY, FRANK CLAYTON BALL, GEORGE A. BALL, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

STATEMENT AS TO JURISDICTION.

WILBER OWEN,
CARL F. SCHAFFER,
E. W. MCCALLISTER,
Counsel for Appellants.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO,
WESTERN DIVISION

Civil Action No. 4426

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HARTFORD-EMPIRE CO., ET AL.,

Defendants.

STATEMENT AS TO JURISDICTION.

In compliance with the requirement of Rule 12 of the Supreme Court of the United States, Ball Brothers Company, Frank Clayton Ball, George A. Ball, W. H. Ball, Edmund F. Ball and Fred J. Petty submit herewith their statement, particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the District Court entered in this cause on October 8, 1942. The petition for appeal was filed on the 3rd day of December, 1942, and is presented to the District Court herewith, to wit, on the 3rd day of December, 1942.

Jurisdiction.

The Supreme Court of the United States has jurisdiction to review on direct appeal the judgment entered in this

cause under Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823, 36 Stat. 1167, 15 U. S. C., Sec. 29) and Section 238 of the Judicial Code as amended (36 Stat. 1157, 38 Stat. 804, 43 Stat., 938, 28 U. S. C., Sec. 345). Reference is made to the following decisions as sustaining the jurisdiction of the Supreme Court of the United States to review the judgment in this cause.

Interstate Circuit Inc. v. *U. S.*, 306 U. S. 208;

Sugar Institute et al. v. *U. S.*, 297 U. S. 553;

Atlantic Cleaners and Dyers et al. v. *U. S.*, 286 U. S. 427;

Standard Oil Co. v. *U. S.*, 283 U. S. 163.

Statutes Involved.

The Sherman Anti-Trust Act of July 2, 1890, as amended, Sections 1, 2 and 4, 26 Stat. 209 as amended by 36 Stat. 1167 (15 U. S. Code, Sections 1, 2 and 4):

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> "Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

"Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

The Clayton Act of October 15, 1914, 38 Stat. 731 and 736 (15 U. S. Code, Sections 14 and 25):

"Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to * * * make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States * * * or a fix price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, ware, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

"Sec. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of

the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violation. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof."

The Issues and Rulings in the District Court.

This is a civil action in which the complaint was filed by the United States of America on December 11, 1939, alleging generally that the defendants in this cause, including the above named defendants and each of them, had violated Sections 1 and 2 of the Sherman Anti-Trust Act of July 2, 1890, as amended (15 U. S. C., Sections 1 and 2), and Section 3 of the Clayton Act of October 15, 1914 (38 Stat. 731, 15 U. S. C., Sec. 14). The complaint charges that the defendants have violated the above mentioned Acts by conspiring to restrain interstate and foreign trade and commerce, and more particularly by acquiring and maintaining monopolies of

(a) patents covering the manufacture and licensing of glass-making machinery,

(b) the manufacture and distribution of glass-making machinery, and

(c) the manufacture, distribution and sale of glass products,

and by excluding others from a fair opportunity to engage freely and unrestrainedly in interstate and foreign trade and commerce in said machinery and glass products.

The complaint alleges further that prior to or on or about October 6, 1922, certain of the defendants entered into such an unlawful conspiracy and that there has been an unlawful attempt to monopolize and to restrain trade among and between the several states of the United States with respect to the production of glass containers and pressed and blown glassware.

The complaint also alleges the acquisition of Letters Patent of the United States by the defendant Hartford-Empire Company and notes the institution of patent litigation under some such patents against several manufacturers of glass containers. (*Hartford-Empire Co.* v. *Obear-Nester Glass Co.*, 39 F. (2d) 769 (7th C. C. A.); *Hartford-Empire Co.* v. *Niwison Weiskopf Co.*, *The Kearns Gorsuch Bottle Co.*, and *The Lamb Glass Co.*, 58 F. (2d) 701 (6th C. C. A.); and *Hartford-Empire Co.* v. *Hazel-Atlas Glass Co.*, 59 F. (2d) 399 (3rd C. C. A.). All this litigation was instituted and terminated prior to March 25, 1933.

The complaint, supplemented by a bill of particulars, charges that Ball Brothers Company, and the above named individual defendants directly associated with it, joined the then existing conspiracy on March 25, 1933, by entering into a written agreement of that date with the Hartford-Empire Company, and under the terms of which it acquired a license to use inventions owned by Hartford-Empire Company—including the inventions defined by the Letters Patent

forming the basis of the above mentioned litigation—in the manufacture of glass containers and also fruit jars, i. e., wide-mouth glass containers sold empty to the domestic or household trade for use by housewives in the preserving of foods.

In the March 25, 1933, agreement, Ball Brothers Company gave Hartford-Empire Company the option to purchase inventions relating to glass feeders owned by it on the same terms upon which it, Ball Brothers Company, would be willing to sell such inventions to others, and Hartford-Empire Company agreed that during the continuance of the license granted by it to Ball Brothers Company, it would not grant to any person, firm or corporation, other than Ball Brothers Company, any further license or right to use, in continental United States, for the making of fruit jars, any apparatus and/or method for dropping mold charges of molten glass into molds. The agreement, however, notes that the defendant Owens-Illinois Glass Company and the defendant, Hazel-Atlas Glass Company, both had an unlimited right or license to use such inventions in the production of glass containers including fruit jars on March 25, 1933, and the proofs disclose that each such company now has such a license.

The complaint also alleges that Ball Brothers Company acquired the fruit jar business of the Knox Glass Company and four of its affiliated companies on or about March 23, 1933 and that said Knox Glass Company and its affiliated companies agreed to stay out out of the glass fruit jar business in continental United States for a period of fifteen years. While denying other allegations concerning this transaction, the answer filed on behalf of Ball Brothers Company admits the purchase of such fruit jar business. The complaint alleges the purchase by Ball Brothers Company in April of 1933 of the fruit jar business of the

Brockway Glass Company and an agreement by that company not to manufacture fruit jars in substantially all of continental United States for a period of fifteen years. The aforesaid answer denies certain of the allegations as to this transaction but admits such purchase.

The complaint also alleges the purchase by Ball Brothers Company of the Three Rivers Glass Company, the factories of which are located at Three Rivers, County of Live Oak, State of Texas. The aforesaid answer admits the purchase in 1936, and the proofs disclose that the purchase was from a receiver in bankruptcy; that the plant of the Three Rivers Glass Company was operated until about December 4, 1937, at which time it was closed down for the purpose of making repairs and of reconditioning the glass melting tank of the Three Rivers plant; and that the tank was reconditioned and other repairs were made, although the Three Rivers plant has not been used to manufacture glassware since the glass melting tank was reconditioned.

The complaint further alleges that contemporaneously with the execution by the Hartford-Empire Company and Ball Brothers Company of the aforesaid agreement of March 25, 1933, Hartford-Empire Company and Ball Brothers Company entered into an agreement with Owens-Illinois Glass Company and Hazel-Atlas Glass Company under the terms of which Hazel-Atlas Glass Company agreed not to produce in excess of 300,000 gross of fruit jars per year, and Owens-Illinois Glass Company agreed not to produce in excess of 100,000 gross of fruit jars per year. This allegation is denied by the aforesaid answer and the proofs submitted not only fail to prove the same but also disclose that there has never been an agreement or an understanding of any kind between any of the parties involved, looking toward or contemplating a limitation on the produc-

tion of fruit jars by either the Hazel-Atlas Glass Company or the Owens-Illinois Glass Company.

The proofs and the findings disclose that subsequent to the filing of the complaint in this cause, to wit on August 1, 1940, Ball Brothers Company entered into a written agreement with Hartford-Empire Company and in compliance with the terms thereof, released Hartford-Empire Company from its obligation not to grant to others the right to use its inventions in the manufacture of fruit jars. Proofs and findings also disclose that on October 16, 1940, the Knox Glass Company and its affiliated companies, the Brockway Glass Company and its president, were all released of all obligations to Ball Brothers Company in connection with the manufacture and sale of fruit jars. That is to say, before any testimony was taken in the present case, Ball Brothers Company attempted to readjust conditions so as to avoid, as far as possible, the continuance of those things objected to by the Government.

Ball Brothers Company and the individual defendants associated with it have contended and now contend that neither it nor they joined, became a party to, or contributed to a conspiracy such as is alleged by the complaint; that they and none of them have contributed to any unlawful restraint of trade either in connection with the sale or distribution of machinery, glass-making procedures or glass containers; that the aforementioned agreement of March 25, 1933, as modified by the agreement of August 1, 1940, is a valid and lawful agreement and that the license acquired by Ball Brothers under the agreement of March 25, 1933, was a legal and valid license; that the acquisition of the Three Rivers Glass plant in 1936 and the acquisition of other plants prior to March 25, 1933, were not for the purpose of restraining competition in connection with the production, sale or distribution of glass-making machinery, glass con-

tainers or fruit jars; and that such acquisition—including the acquisition of the fruit jar business of the Knox Glass Company and its affiliates and of the Brockway Glass Company, did not result in an unlawful restraint of trade nor contribute to a conspiracy in restraint of trade as alleged by the Complaint in this cause.

Grounds Constituting Basis for Contention That the Issues Here Involved Are Substantial.

As previously noted, the final judgment in this cause was entered on October 8, 1942. While it is contended that this judgment is based on inferences and is not only not supported by evidence offered on behalf of the Government, but is also in conflict with substantial evidence adduced on behalf of defendants, it is noted that the Court, in preparing and entering the final judgment, ignored the fact that many of the issues involving Ball Brothers Company and the individual defendants directly associated with it, were rendered moot by the supplement agreement of August 1, 1940, between Ball Brothers Company and Hartford-Empire Company, and by the releases of October 16, 1940, to the Knox Glass Company and its affiliated companies and to the Brockway Glass Company and its affiliated companies, and by the passage of time.

In addition, the final judgment is of such form that it has the effect of enjoining future violations of the law as defined by Sections 1 and 2 of the Sherman Anti-Trust Act, and independently of whether or not the acts so restrained are of the same type or class as those found by the Court to have contributed to or to have been in fulfillment of an *illegal conspiracy. National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 435. Then too, the defendant Ball Brothers Company and the individual de-

fendants directly associated with it, are enjoined from future violations of the Clayton Act, although there is nothing in the proofs which indicate or suggest that Ball Brothers Company or any of the individual defendants directly associated with it, has violated or has even attempted to violate the law as defined by the Clayton Act.

Among the many features of the above mentioned judgment which are assigned as error in connection with the present appeal, we note the following:

(1) That paragraph 20 of such judgment has the force and effect of depriving Ball Brothers Company and the individual defendants directly associated with it, of the free and lawful use and enjoyment of at least some of their properties because each such defendant is enjoined from leasing or otherwise distributing or surrendering possession of glass-making machinery by means other than an outright sale for cash or a sale on credit not to extend over a period of more than two years, if and when such defendant is engaged in the business of distributing glass-making machinery.

(2) That paragraph 24 of the afore-mentioned judgment has the force and effect of imposing a penalty on Ball Brothers Company and each of the individual defendants directly associated therewith, in that it deprives each such defendant of at least some of the advantages contemplated by law as to Letters Patent of the United States and as to application for such Letters Patent, so long as each such defendant continues to engage in the business of distributing glassware in interstate commerce. That is to say, paragraph 24 of said judgment enjoins each defendant from engaging in the business of distributing glassware in interstate commerce unless it goes on record in the District Court and agrees not only to grant a free license, under certain

of its or his Letters Patent and applications for Letters Patent, to each applicant for such a license, but also to furnish to each such applicant copies of any and all drawings and patterns owned or controlled by the respective defendant and which relate to the machinery or methods used in the manufacture of glassware embodying licensed inventions.

(3) That paragraph 26 of the said judgment and particularly each of sub-paragraphs a and c thereof, has the force and effect of depriving each defendant of the right to enforce such patent rights covering inventions embodied in machinery for making glassware as he may own, and independently of whether or not the patented invention involved has been or is being used in violation of the Anti-Trust Acts or in a way to conflict with the lawful rights of individual members of the public.

(4) That paragraphs 44 and 58 of said judgment have the force and effect of not only imposing a penalty on Ball Brothers Company, but of also imposing the penalty under conditions such as to deprive Ball Brothers Company of the right of appeal before the order imposing such penalty became effective. (*United States* v. *Addyston Pipe & Steel Co.* (6th C. C. A.) 85 F. 271, 301-302, modified by *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 212, but not as to the point here involved. Under the terms of paragraph 44 of such judgment, Ball Brothers Company was compelled to pay to the Clerk of the Court the sum of $425,000.00, and even though the District Court failed to find any fact as a basis for imposing such a penalty, and the pleadings in this cause also fail to provide a basis for imposing such a penalty.

It is submitted that some of those portions of the judgment to which reference has been made have the effect of